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No. 00-1826

In the Supreme Court of the United States

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,

Petitioner,

v.

BELINDA ALEXANDER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States ("the Chamber") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

The Chamber, a non-profit corporation organized under the laws of the District of Columbia, is the largest federation of business, trade, and professional corporations in the United States. The Chamber represents an underlying membership of approximately three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber believes that this case presents the Court with a valuable opportunity to clarify the limitations placed by the Due Process Clause of the Fourteenth Amendment on the authority of state courts to abandon traditional, time-honored safeguards historically observed in the conduct of civil litigation. State and federal courts face growing pressure to fashion novel methods of processing a rising tide of complex litigation, including mass tort cases involving asbestos, tobacco, drugs, medical devices, automobiles, and other products; and class actions against insurance companies, banks, and other businesses. In the decision below, the Mississippi Supreme Court substantially relaxed — to the point of abandoning — a vital prerequisite to the joinder of parties in a single civil lawsuit. As a result, business defendants in the Mississippi courts now face the prospect — without even the minimal protections inherent in a class action, which Mississippi does not permit — of liti-

gating cases against hundreds if not thousands of individual plaintiffs joined as parties to a single lawsuit.

This is no idle or parochial concern. Modern mass tort litigation is a ship capable of calling in any friendly port. Even before the decision below, Mississippi had become a "'Mecca' for mass tort suits against national industry." Pet. 3 (citing Ballard, *Mississippi Becomes A Mecca for Tort Suits*, NAT'L L.J., April 30, 2001, at A1). For example, rural Jefferson County, with a population of 8345 and a potential jury pool of 6571 voters, has been the situs of a series of tort lawsuits resulting in multi-million-dollar verdicts or settlements — all presided over by Judge Lamar Pickard, the county's only judge who hears major civil cases. As a consequence of the decision below, Mississippi will become an even more powerful magnet for mass tort litigation in the United States, with ripple effects felt throughout the national economy by a wide array of industries.

Finally, the Chamber has a substantial interest in ensuring that review is not denied, incorrectly, for lack of a "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. As we explain below, the Mississippi Supreme Court's decision is reviewable under this Court's decisions interpreting Section 1257's "finality" requirement. The Court should apply its pragmatic approach to finality questions in this case to "avoid the mischief of economic waste and of delayed justice." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 478 (1975) (internal quotations omitted).

Such flexibility is especially important given the growing number of multistate class actions and other mass tort cases that are being filed in the *state* courts. See Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation*, at 15 (1997) ("[the] doubling or tripling over the past several years of the number of putative class actions" faced by U.S. companies has been "concentrated in the state courts"). This trend is a reaction to a series of *federal* decisions holding that nationwide class actions could not be certified consistent

with the requirements of Fed. R. Civ. P. 23, due process, and federalism. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *Andrews* v. *AT&T*, 95 F.3d 1014 (11th Cir. 1996); *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). See also Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions — formerly the province of federal diversity jurisdiction — are being brought increasingly in the state courts."). This case is a telling example: it was only *after* a federal court refused to certify federal class actions that the plaintiffs' counsel filed these cases in the Mississippi courts. See Pet. 4-5.

In the Chamber's experience, the latest wave of multistate class actions and other mass litigation in the state courts — many of which no federal court would certify — frequently result in serious threats to the federal constitutional rights of business defendants. The Chamber has a substantial interest in ensuring the continued availability of review by this Court of decisions of the state courts that finally resolve important federal constitutional questions in such cases.

The Chamber's motion for leave to filed the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

The respondents (plaintiffs below) are 659 individuals who borrowed money from Fidelity Financial Services of Mississippi ("Fidelity") to purchase automobiles. At the time of those individual loan transactions, each respondent "lived in a different locale (51 different Mississippi counties and 11 states); each purchased a different vehicle, at a different time, from a different automobile dealer; and each had different discussions with different salespersons and loan officers at different Fidelity offices who made separate representations to each individual plaintiff." Pet. 6-7. In signing their individual loan contracts, respondents each agreed to keep the collateral (*i.e.*, the vehicle) protected by insurance during the term of the loans. If any of the individual respondents failed to discharge this contractual obligation, however, Fidelity was expressly authorized under the individual loan contracts to purchase "single interest" collateral protection insurance ("CPI"), and to pass the cost of the CPI along to the individual borrowers. Petitioner, the American Bankers Insurance Company of Florida ("American Bankers"), was one of two companies that sold CPI coverage to Fidelity.

At different times and for different reasons, each of the 659 respondents eventually defaulted. Some defaulted on their monthly payments, and their vehicles were repossessed; others merely defaulted on their contractual obligation to maintain insurance. Each respondent "has a different story for defaulting

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

on the insurance obligation: some * * * were involved in automobile accidents, some simply refused to pay, some could not obtain insurance, and some were happy to allow Fidelity to purchase CPI because it was less expensive than their previous insurance." Pet. 7. Each respondent claims to have been wrongfully charged a different amount for CPI purchased by Fidelity, since the cost of coverage depended upon its duration as well as on the value of the collateral, which was of course different in each case.

On the basis of those individual loan transactions, and the case-specific decisions by Fidelity to purchase CPI for each respondent, respondents alleged that Fidelity and American Bankers had engaged in fraud, breached their fiduciary duties, and engaged in a "nefarious scheme" involving CPI. Pet. 7. After a federal court refused to certify class actions based on those individualized claims, respondents filed complaints in state court in selected Mississippi counties. Because Mississippi does not allow class actions, respondents asked the trial courts to order a mass joinder of parties under Rule 20 of the Mississippi Rules of Civil Procedure. Like Fed. R. Civ. P. 20 and the joinder rules of virtually every other State, Mississippi's rule permits the joinder of multiple plaintiffs as parties only if the plaintiffs assert a "right to relief jointly, severally, or in the alternative in respect of or arising out of the *same transaction, occurrence, or series of transactions or occurrences*," and if a "question of law or fact common to all these persons will arise in the action." Miss. R. Civ. P. 20 (emphasis added).

The Mississippi trial courts ordered mass joinder of respondents' claims, and those rulings were affirmed by a sharply divided Mississippi Supreme Court. Pet. App. 1a-28a. In the majority's view, the "same transaction" requirement was satisfied because the varying CPI costs charged to individual respondents were all governed by a single "master policy" issued by American Bankers to Fidelity, because the "insurance certificate issued to each [respondent] was identical,"and because respondents vaguely alleged that American Bankers and Fidelity had

conspired to defraud them by charging excessive rates in an inequitable manner. Pet. App. 6a-7a & n.4, 11a. The majority summarily rejected American Bankers' argument that the joinder in a single lawsuit of hundreds of individual plaintiffs — each advancing multiple claims based on different, highly fact-specific assertions — would "violate [the company's] fundamental right to a fair and impartial trial." Pet. App. 13a; see also *ibid.* (rejecting objection that mass joinder would result in "cumulative and otherwise inadmissible evidence being admitted from multiple, separate, and unrelated transactions").

In dissent, four justices condemned as unprecedented the majority's broad interpretation of the "same transaction or occurrence" requirement. Pet. App. 25a-28a. In the dissenters' view, that fundamental requirement is satisfied — and joinder of parties is proper — only if "the cases have a common nucleus of facts," which "necessarily implies that the plaintiffs' claims will be more similar than dissimilar." *Id.* at 27a. Moreover, the record in these cases (including respondents' vague allegations) was simply insufficient, in the dissenters' judgment, to determine whether the "same transaction" requirement, properly understood, was satisfied here. The dissenters elaborated:

> There is no indication of the date or time that the plaintiffs formed a relationship with Fidelity * * *, the office or location [in which] * * * the fiduciary relationships developed, the Fidelity employees who may be potential witnesses, the various reasons that the plaintiffs defaulted on their obligations with Fidelity causing insurance coverage by American Bankers * * * to become an issue, or the amount of actual damages of each plaintiff. These facts are essential to a determination whether the plaintiffs in this case have shown a common transaction or occurrence, as these cases all potentially involve vastly different evidence.

Pet. App. 25a. "If the plaintiffs' cases arose at different Fidelity offices employing different personnel and different agreements, then the proof of each case is likely to involve different

witnesses and evidence." *Id.* at 26a-27a. "Judicial economy is not served," the dissenters explained, "if we overburden our trial courts through joinder with cases that involve potentially different evidentiary proofs." *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

With barely a nod to the U.S. Constitution, the Mississippi Supreme Court has substantially relaxed — to the point of abandoning — a vitally important prerequisite to the joinder of multiple parties in a single civil lawsuit: the requirement that the claims of the joined parties arise from "the same transaction or occurrence." Without that essential common ground, a trial featuring multiple, misjoined parties will necessarily result in extreme unfairness to the litigant who is situated on the opposite side of the "v." A defendant facing numerous misjoined plaintiffs, for example, will be forced to respond to a welter of multifarious factual allegations and claims. Because of this potential for unfairness, the joinder rules long applied in virtually every State — and in the federal courts — have given real teeth to the "same transaction or occurrence" requirement. By effectively abandoning this traditional safeguard, and upholding the mass joinder of hundreds of individual plaintiffs in these cases, the Mississippi Supreme Court has infringed the due process rights of petitioner and threatened the due process rights of scores of other national businesses that are (or will become) the targets of mass joinder cases in the Mississippi courts.

Further review is warranted because this case presents the Court with a valuable opportunity to clarify the limitations placed by the Due Process Clause of the Fourteenth Amendment on the authority of state courts — in the name of judicial efficiency — to abandon traditional, time-honored safeguards historically observed in the conduct of civil litigation. In recent years, that issue has arisen with increasing frequency as the state courts have struggled to manage the growing number of mass tort actions involving asbestos, tobacco, prescription drugs, medical devices, paint, handguns, automobiles, and other products as well as a variety of other class actions. Although

decisions such as *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994) (invalidating Oregon's refusal to apply traditional review of excessiveness of damages), and *Richards* v. *Jefferson County*, 517 U.S. 793 (1996) (invalidating Alabama's refusal to apply traditional res judicata requirement of representation in a prior lawsuit), provide valuable reaffirmation that the Constitution limits extreme departure from traditional procedural safeguards, those cases did not involve common-law or traditional restrictions on the basic architecture of a civil lawsuit. Indeed, as the Court noted in *Oberg*, "[b]ecause the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial"; "most" of this Court's "due process decisions involve arguments that traditional procedures provide too little protection." 512 U.S. at 430. This case accordingly provides an excellent opportunity to clarify the limits imposed by due process on state authority to disregard procedural protections long afforded to litigants.

Review should be granted *now* even though the Mississippi Supreme Court's decision did not bring the litigation below to an end. As we explain below, the 5-4 decision of the Mississippi Supreme Court qualifies under this Court's decisions as a "final judgment" that is reviewable under 28 U.S.C. § 1257 as construed in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Even if the Court does not see this case as fitting within one of the four categories identified in *Cox Broadcasting* — in which the Court said there were "at least" four categories of cases qualifying for an exception to strict finality — it should apply its "intensely practical approach" to determining "finality" in this case.[2]

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[2] See, *e.g.*, *American Export Lines, Inc.* v. *Alvarez*, 446 U.S. 274, 277 (1980) (exercising jurisdiction under 28 U.S.C. § 1257 even though state court decision did not "readily fit into any of the categorical exceptions to strict finality" recognized in *Cox Broadcasting*).

I. THE DUE PROCESS ISSUE PRESENTED IN THIS CASE WARRANTS THE COURT'S ATTENTION

In the decision below, the Mississippi Supreme Court has eliminated a fundamental precondition to permissive joinder of parties in a single civil lawsuit: the requirement that the claims of the joined parties all arise from "the same transaction or occurrence." Virtually every State of the Union, and the federal courts, authorize the use of permissive joinder only when this essential precondition is satisfied. See Pet. 15. The three States that do not impose this requirement set even stricter limitations on joinder. See *id.* at 15 & n.19.

Respondents' claims do not come close to satisfying the "same transaction" test. Each claim arises out of a *manifestly distinct transaction*: the purchase of a particular automobile at a particular price by an individual respondent; the purchaser's execution, in connection with that purchase, of a loan agreement with Fidelity; and the subsequent imposition of a CPI charge when the purchaser, for reasons largely if not entirely unique to him or her, failed to discharge the contractual obligation to maintain insurance on the vehicle (and, in some cases, ceased to make payments altogether on the loan). Each respondent lives in a different place; each dealt with different salespersons and loan officers at different Fidelity offices who made separate representations at different times; each accordingly will call different witnesses; and each claims a different amount of damages. Not only are these transactions not "the same"; they have almost nothing in common.

Respondents, however, argued successfully below that all of the myriad and multifarious transactions and occurrences underlying respondents' claims in fact arose out of a single "transaction or occurrence" and thus could be joined in a single, sprawling lawsuit. Respondents and the court below attempted to justify that Alice-in-Wonderland interpretation of "transaction or occurrence" merely by observing that the CPI charged in each of their cases was pursuant to a master policy issued to Fidelity by petitioner American Bankers, the insurance certifi-

cate issued to each respondent was identical, and (respondents vaguely alleged) American Bankers and Fidelity had entered into a "nefarious scheme" to defraud them by charging excessive rates in an inequitable manner. Under the majority's logic, Mississippi plaintiffs henceforth will be able to join together in one gigantic lawsuit any number of individualized tort or other claims against a single defendant, so long as the plaintiffs can identify some common supplier or business partner of the primary defendant whose dealings with the primary defendant can be characterized as a "nefarious scheme." Since large businesses often consolidate their business with one or two suppliers, the possibilities for mass joinder are, if not endless, then limited only by the reach of a fertile legal imagination. Under the lower court's rationale, for example, every person in the United States who is injured by a defendant's product — no matter how the accident occurred or what aspect of the product's design allegedly was responsible for the particular plaintiff's injury — presumably could join in a single lawsuit in Jefferson County, Mississippi.

The majority's "standard" is no standard at all. It essentially reads the "same transaction or occurrence" requirement out of the joinder rule. By doing that, it threatens to subject business defendants in the Mississippi courts to mass proceedings that are extremely difficult, if not impossible, to defend. As the dissenting justices correctly noted, the "same transaction or occurrence" requirement is drained of all meaning unless "the cases have a common nucleus of facts," which in turn "necessarily implies that the plaintiffs' claims will be more similar than dissimilar." Pet. App. 27a. See also Fed. R. Civ. P. 23(a) (authorizing class actions only where there are "questions of law or fact common to the class" and the claims or defenses of the representative parties are "typical of the claims or defenses of the class").

The Due Process Clause of the Fourteenth Amendment requires state courts to ensure that a party is accorded adequate procedural safeguards before being deprived of a property or liberty interest (see, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319,

335 (1976)), and it also protects against "arbitrary and inaccurate adjudication" (*Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994)). At a minimum, due process guarantees "a meaningful opportunity to present a complete defense" (*Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986)) and safeguards the "right to litigate the issues raised" (*United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971)). For that reason, it is plain that due process is denied when a jury becomes so overwhelmed by the parties' presentations or so distracted by extraneous material that it cannot return a fair verdict; "[a] fair trial in a fair tribunal is a basic requirement of due process." *Estes* v. *Texas*, 381 U.S. 532, 543 (1965). And this Court has made clear that due process requirements are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of" claims to be adjudicated. *Philips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985). "[C]onsiderations of convenience and economy *must* yield to a paramount concern for a fair and impartial trial." *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (internal quotations omitted; emphasis added).

Mississippi's mass joinder procedure violates due process. As explained above, it represents a rejection of the uniformly established procedural safeguard — long embodied in the joinder rules of virtually every American jurisdiction — under which parties joined in a single lawsuit must have claims that arise out of the "same transaction or occurrence." This Court has emphasized that "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430 (citing cases). See also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856); *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927); *In re Winship*, 397 U.S. 358, 361-362 (1970). The Mississippi Supreme Court's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 430.

Even putting the presumption of unconstitutionality to one side, mass joinder of parties who lack claims that arise from the same transaction or occurrence is manifestly unfair. To see why this is so, one need only imagine what is would be like for a single defendant to be forced, at trial, to defend against a handful of entirely unrelated plaintiffs, each advancing a variety of claims. Suppose that a manufacturer were sued by a former employee for race discrimination; by a disgruntled customer for fraud associated with the sale of a product; by another disgruntled customer who purchased a different product for negligent product design and breach of warranty of fitness; by a competitor for violations of RICO and the antitrust laws; by a landlord for breach of a commercial lease; and by shareholders for securities fraud. A trial that featured such a welter of allegations by divergent plaintiffs could not possibly be fair. The mere fact that these wildly divergent claims were combined in a single proceeding would make it impossible for a defendant to receive a fair hearing.

Respondents' claims, even if not quite as divergent as those in this example, arise out of such divergent circumstances as to raise an equally serious risk of jury confusion. In addition, as petitioner notes, the complaints involved in this case "allege 13 distinct fact-specific claims against three remaining defendants, including * * * fraud, breach of fiduciary duty and conspiracy." Pet. 20-21. Even in a six-plaintiff trial, then, the jury would be required to decide the facts regarding six separate lending transactions as well as to resolve a total of 234 individual claims arising from these unconnected transactions. That is a recipe for jury confusion.

What is more, the greater surface similarity in respondents' claims gives rise to risks of its own: faced with similar claims by multiple plaintiffs (but ones arising out of wholly different transactions or occurrences), jurors would be strongly inclined to believe that the defendant is culpable. See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, 187 F.R.D. 293, 305 (1999) ("[A]ggregated plaintiffs may acquire power that dispersed individual plaintiffs

would lack, enhancing — and perhaps exaggerating — their underlying substantive rights"); Borden & Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 59 (1998) (reporting finding that "the amount of responsibility assigned to the defendant" by juries increased "as the size of the nontrial plaintiff population increased" in mass litigation). This risk is compounded in these cases because respondents' lawyers were perfectly free to select which of the many hundreds of clients they represented to present first in the sequential trials ordered below. See *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (Due Process Clause prohibits the use of statistical sampling techniques unless the sample cases "are representative of the larger group of cases or claims from which they are selected").

The severe prejudice caused by the Mississippi Supreme Court's mass joinder procedure is aggravated, moreover, by other features of Mississippi law. As petitioner points out (Pet. 5 & n.4), venue in the Mississippi courts is proper in any forum where one joined plaintiff resides. This allows forum-shopping of the most egregious sort. The availability of standardless mass joinder in Mississippi thus gives plaintiffs' lawyers carte blanche to concentrate vast numbers of claims and plaintiffs in hand-picked rural counties famous for producing astronomical verdicts.[3] Unless this Court intervenes to correct this situation,

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[3] Mississippi's substantive law also makes the state an attractive forum for tort plaintiffs from around the country. For example, the Mississippi Supreme Court recently held that "hedonic damages" (*i.e.*, damages for the "loss of enjoyment of life") are recoverable in personal injury actions in Mississippi in addition to the usual types of economic damages (lost wages, medical expenses) and damages for pain and suffering. *Kansas City Southern Railway Co.* v. *Johnson*, 2001 WL 107864, at *5-*7 (Miss. Feb. 8, 2001). In so holding, the Mississippi Supreme Court refused to follow those jurisdictions that have declined to recognize hedonic damages. *Ibid.* In *Johnson*, the Mississippi Supreme Court also upheld (*id.* at *7-*8) the admission of expert testimony by Dr. Stan Smith, a notorious plaintiffs' "expert" on hedonic damages whose controversial "willingness to pay" methodology has been rejected as unreliable — and whose testimony has

litigants will face years of injustice in mass joinder cases in Mississippi.

Even before the decision below was issued, Mississippi had become a "'Mecca' for mass tort suits against national industry." Pet. 3 (citing Ballard, *Mississippi Becomes A Mecca for Tort Suits*, NAT'L L.J., April 30, 2001, at A1). Since 1995, at least nineteen Jefferson County damage awards have exceeded $9 million, and six have exceeded $100 million each. Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER, June 18, 2001. Jefferson County's reputation for massive verdicts has spurred lawyers to troll for potential plaintiffs by inundating county residents with advertisements in the local paper and on local television. See *Critics Link Lawyer Ads, Big Awards*, CLARION-LEDGER, June 18, 2001; *Fox News: Special Report with Brit Hume*, 2001 WL 5000700 (June 4, 2001) ("The local papers are filled with attorney advertisements, searching for county residents with any problem that may have been caused by any product.").[4] Lawyers in out-of-state plaintiffs' firms reportedly are scurrying to take the Mississippi bar so that they will be eligible to purchase a ticket in this lottery. See Ballard, *supra*, NAT'L L.J., April 30, 2001, at A1 (reporting that "many of the 41 lawyers" in an Alabama plaintiffs' firm "have recently taken the Mississippi bar exam").

Faced with the prospect of defending a lawsuit in Jefferson County, many companies have felt compelled to offer

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been excluded under Fed. R. Evid. 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) — by "the vast majority" of federal courts to have considered the issue. *Kurcnz* v. *Honda North America, Inc.*, 166 F.R.D. 386, 388-389 (N.D. Ill. 1996) (collecting cases).

[4] The Bankston Drug Store, Jefferson County's only pharmacy, has been named so often as a defendant in mass tort cases against nationwide pharmaceutical companies (in order to destroy complete diversity and thus thwart removal to federal court) that its mom-and-pop owners have "lost count." Kraft, *Hitting the Jackpot in Mississippi Courtrooms: Pharmacies Often in the Middle*, CLARION-LEDGER, June 17, 2001, at 16A; Ballard, *supra*, NAT'L L.J., April 30, 2001, at A1.

settlements that do not reflect the merits of the case. See Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER, June 18, 2001. The threat of large jury verdicts persuaded forty-four companies to stop selling certain types of insurance in Mississippi or to pull out of the state altogether. *Big Jury Awards Have Insurers on Run from State*, COMMERCIAL APPEAL, June 20, 2001. As a consequence of the decision below, Mississippi will become an even more powerful magnet for mass tort litigation in the United States, with ripple effects felt throughout the national economy by a wide array of industries.

This is not a purely local phenomenon, nor is it one that this Court should ignore. The prospect of years of coercive and egregiously unfair proceeding in the Mississippi courts, with the resultant negative consequences on the national economy, is one that should give this Court pause. Moreover, this Court has a responsibility to ensure that state courts adhere to minimum due process requirements imposed by the federal Constitution, at least where, as here, the state courts have refused to discharge that responsibility.

Finally, review should be granted because this case presents the Court with a valuable opportunity to clarify the limitations placed by the Due Process Clause of the Fourteenth Amendment on the authority of state courts to abandon traditional, time-honored safeguards historically observed in the conduct of civil litigation. In recent years, state and federal courts have faced growing pressure to fashion novel methods of processing a rising tide of complex litigation, including mass tort cases and a variety of class actions.[5] In response to the pressures of managing mass tort litigation of unprecedented scope, state judges

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[5] See, *e.g.*, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997) (selection of "bellwether" plaintiffs); *ACandS, Inc.* v. *Abate*, 710 A.2d 944 (Md. Ct. Spec. App.) (mass consolidation), cert. denied, 713 A.2d 979 (Md. 1998), cert. denied, 525 U.S. 1171 (1999); see generally Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Require?*, 8 WM. & MARY BILL RTS. J. 199 (1999).

have felt obliged, in a variety of contexts, to abandon the traditional protections of the common law for reasons of efficiency. See, *e.g.*, Mulderig, Wharton & Cecil, *Tobacco Cases May Be Only the Tip of the Iceberg for Assaults on Privilege*, 67 DEF. COUNSEL J. 16, 19-23 (2000) (explaining that Minnesota trial court, in response to sheer number of documents whose privilege status was disputed by plaintiffs, abandoned the traditional safeguard of document-by-document review in examining privilege claims and instead used an unprecedented categorization procedure that yielded demonstrably inconsistent results). Greater guidance from this Court would substantially assist the lower courts in evaluating when departures from traditional safeguards in mass tort and other complex litigation are constitutionally permissible.

II. THE DECISION BELOW IS A "FINAL JUDGMENT" THAT THIS COURT HAS JURISDICTION TO REVIEW

This Court's certiorari jurisdiction over decisions of the state courts is conferred by 28 U.S.C. § 1257, which authorizes review of any "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had." Although in theory this "finality" requirement might be understood as precluding review "where anything further remains to be determined by a State court," this Court has long eschewed "such a mechanical" interpretation. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). Instead, it has consistently applied an "intensely practical approach" to determining "finality." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976); see also *Cox*, 420 U.S. at 478 & n.7 ("[T]he requirement of finality is to be given a practical rather than a technical construction.") (internal quotations omitted). "[A]s the cases have unfolded, the Court has recurringly encountered situations" in which it elected to treat decisions of the state courts as "final" even though "there [we]re further proceedings in the lower courts to come." *Id.* at 477. In *Cox*, the Court specifically took note of "at least four categories of such cases" that had been recognized to date. *Ibid.*

A. This Court Has Jurisdiction Under Established Case Law

The Mississippi Supreme Court's decision is reviewable under several lines of this Court's decisions. To begin with, it falls within the fourth category recognized in *Cox*. That category encompasses cases in which (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and (3) "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-483.

Each of those conditions is satisfied here. *First*, petitioner's federal due process objection to mass joinder was fully considered — and squarely rejected — by the Mississippi Supreme Court. See Pet. App. 12a-14a. In addition, it is possible for the petitioner, if review is denied, to prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal due process issue by this Court. *Second*, if this Court were to grant review and reverse on the ground that the mass joinder endorsed by the lower court violates due process, that would necessarily terminate respondents' current lawsuits, which involve hundreds of improperly joined parties. Nor is this all. Because only a tiny fraction (2%) of the individual respondents would have proper venue if they refiled their lawsuits individually in the courts in which these mass lawsuits are pending (see Pet. 4-5, 14, 17 & n.20, 18), reversal would have the further effect of eliminating at least 98% of respondents' claims from the dockets of the pertinent counties. Thus, reversal would do more than merely affect "the nature and character" of respondents' legal claims; it would terminate the existing lawsuit and bar the vast majority of the individual claims in the current fora.

Third, federal policy would be seriously undermined if this Court declines to exercise immediate review. The right to due process of law is a fundamental protection in our constitutional scheme. As explained above, numerous federal courts have concluded that mass tort claims of the kind involved here cannot be certified consistent with the requirements of due process and of Fed. R. Civ. P. 23. In fact, that very conclusion was reached *in these cases* by federal courts before the present lawsuits were filed. A clearer example of subverting federal policy is thus difficult to imagine.[6]

The decision below is also reviewable under *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). That case involved an action brought in the Texas courts by a receiver for an insurer in liquidation against two national banks and numerous other defendants. The national bank defendants claimed that, under a federal statute, they could not be sued in Travis County, Texas, and that venue was proper only in Dallas County. The trial judge overruled that objection, and the Texas Supreme Court upheld that ruling. Notwithstanding the obviously interlocutory nature of the Texas Supreme Court's decision, this Court exercised jurisdiction under Section 1257.

In reaching that result, the Court explained that the banks had raised a "a substantial claim * * * that a federal statute, rather than a state statute, determines [venue]." 371 U.S. at 558. If the banks were correct on the merits, moreover, the law would "prohibit[] further proceedings against the defendants in the state court in which the suit is now pending." *Ibid.* The issue of whether venue was proper, this Court added, "is a sep-

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[6] See also *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984) (exercising jurisdiction over interlocutory decision of state court that rejected due process challenge to exercise of personal jurisdiction); *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977) (same); *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 2-3 (1965) (Goldberg, J., in chambers) (on petition for a stay, stating that state decision rejecting due process challenge was final under Section 1257 because, among other things, it threatened a serious erosion of national policy).

arate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiffs' cause of action." *Ibid.* Finally, the Court explained, it would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court [the banks] may be tried rather than to subject them, and [the receiver], to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." *Ibid.*

This case is quite similar. Here too, petitioner has raised a substantial question of federal constitutional law concerning the legality of Mississippi's mass joinder procedure. The Mississippi Supreme Court has considered and emphatically rejected petitioner's due process arguments. If petitioner is correct that the extraordinary proceedings below violate due process, proper application of the Constitution would terminate the pending lawsuits in their current form and, because of Mississippi's venue rules, "prohibit[] further proceedings" by the vast majority of the individual respondents "in the state court in which the suit[s are] now pending." Moreover, the joinder issue, like venue, is an important threshold matter that is anterior to the merits. Although a determination of the question presented here obviously would require a basic understanding of the respondent's allegations and why they cannot be said to arise out of the "same transaction or occurrence," the principal focus of the legal analysis would be on whether Mississippi's mass joinder procedure abandons safeguards historically observed in this country, deprives litigants such as petitioner of a fair trial, and flunks the test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

Here, even more than in *Langdeau*, it would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine" the joinder question "now * * * rather than to subject [petitioner] * * * to long and complex litigation which may all be for naught if consideration of the preliminary question * * * is postponed until the conclusion of the proceedings." 371 U.S. at 558. If anything, the burdens on petitioner

here will be far greater than the burdens on the two national bank defendants in *Langdeau*. Indeed, without this Court's intervention, petitioner will face the prospect of *more than a hundred* sequential trials by groups of misjoined respondents. See Pet. 8-9, 17, 21. Nor is that all. The effect of the Mississippi Supreme Court's decision will predictably be felt well beyond the cases involved here. Not just petitioner, but scores of other business defendants, will be forced in countless other lawsuits filed in rural Mississippi courts to undergo proceedings that violate fundamental norms of due process. For that reason as well, this Court should treat the decision below as final within the meaning of Section 1257.

B. Practical Considerations Strongly Favor Review In This Case

Even if the Court concludes that this case does not fit perfectly within one of the established categories of "final decisions" described in *Cox Broadcasting*, it still can — and should — exercise jurisdiction under 28 U.S.C. § 1257. This Court has long applied a "practical rather than a technical construction" to determining finality. *Cox*, 420 U.S. at 478 & n.7. Under the Court's "intensely practical approach" to finality issues (*Mathews*, 424 U.S. at 331 n.11), the decision below is in every practical sense the final word of Mississippi's highest court.

This is not a case where the highest court of a State has declined to entertain a discretionary interlocutory appeal, leaving in place the decision of an intermediate state appellate court that might be subject to review, and correction, by the state supreme court in some future appeal. Compare *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (per curiam) ("Giving the California Supreme Court an opportunity to consider the issue in a case that properly raises it is a compelling reason for us to dismiss the petition."). In the decision below, the Mississippi Supreme Court considered, and squarely rejected on the merits, the due process objections to mass joinder. Any revisitation of that issue in some distant return trip of this case to the Mississippi

Supreme Court would have to overcome the force of the law-of-the-case doctrine.[7]

Second and more important, there is a substantial likelihood that, if the Mississippi Supreme Court's decision is allowed to stand, the denial of certiorari will spell the effective end to this litigation. As the Seventh Circuit has explained in a closely related context, companies that face a large certified class and the possibility of enormous damages are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.); see also Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, 187 F.R.D. 293, 305 (1999) ("[A]ggregation often creates an 'all or nothing' risk that defendants find unbearable," even where "the class claim is weak or the settlement terms are otherwise unjustifiable."); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (class certification "dramatically affects the stakes for defendants," "makes it more likely that a defendant will be found liable," and "creates insurmountable pressures on defendants to settle"); Pet. 26. If a company determines (as many do) that it simply cannot afford to "roll the[] dice" with a jury, and settles the lawsuit, "the class certification — the ruling that will have forced them to settle — will never be reviewed." *Rhone-Poulenc*, 51 F.3d at 1298. The same is true of the Mississippi Supreme Court's joinder decision in this case. It may well escape review — not only here but in scores of other lawsuits filed in Mississippi — for the simple reason that companies are unwilling to proceed to trial

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[7] Of course, application of Mississippi's law-of-the-case doctrine by the Mississippi Supreme Court in a later appeal in this case would not preclude this Court's review of the due process issue at that time. See *Hathorn* v. *Lovorn*, 457 U.S. 255, 261 (1982). But cf. Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1014 (1978) (arguing that "the independent and adequate state grounds doctrine and the rule of finality are of equal authority as limitations on the jurisdiction of the Supreme Court" and that "there is no principled reason for compromising one out of a desire to avoid giving effect to the other").

under the egregiously unfair ground rules endorsed by the Mississippi Supreme Court in this case.

This Court has not hesitated to take account of such practical realities. For example, in *Local 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963), this Court exercised jurisdiction over a decision of the Georgia Supreme Court reversing the denial of a temporary injunction. Applying a "practical rather than a technical construction" to 28 U.S.C. § 1257, the Court rejected the argument that it should await a request to review a ruling by the state courts on a permanent injunction, explaining: "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of petitioner's rights and render illusory his right to review here * * *." 371 U.S. at 550. The same can be said here. See also *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976) ("statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered").

In the Chamber's experience, this case is illustrative of the recent wave of multistate class actions and other mass litigation filed in the state courts — many of which no federal court would allow. These cases often present serious threats to the federal constitutional rights of business litigants. Given the practical realities of such litigation, the Chamber is concerned to preserve some meaningful ability of business litigants embroiled in such litigation to seek review in this Court. Although, as explained above, there are several special features of the decision below that render it "final" as a practical matter under 28 U.S.C. § 1257, the broader category of class certification decisions and other threshold aggregation decisions by the state courts should not be regarded as falling automatically outside this Court's jurisdiction.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, review should be granted in this case.

Respectfully submitted.

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